United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7219

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7219

PAT WRIGHT and JACK LIEBERMAN,

Plaintiffs-Appellants,

-against-

CHIEF OF TRANSIT POLICE, and CHAIRMAN and MEMBERS OF THE BOARD OF THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees.

1975 JUL 14 PM 2:43

R Kunard

B

P/S

PLAINTIFFS-APPELLANTS' REPLY BRIEF

HERBERT JORDAN
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
(212) OXford 7-8640
Attorneys for Plaintiffs-Appellants

July 14, 1975

3

PLAINTIFFS-APPELLANTS' REPLY BRIEF

I

Defendants do not deny that they are "persons." Instead, in an effort to save the district court's ruling as to subject matter jurisdiction, defendants shift attention to the substance of plaintiffs' cause of action under §1983.

Defendants assail plaintiffs' cause of action because it challenges "the action or policy of the Transit Authority, a corporate body . . . ." Def. Br., p. 6. This This argument is concerned not with whether defendants are "persons" within the meaning of §1983, but with whether a Transit Authority regulation is subject to constitutional scrutiny in an action under §1983.

It is beyond argument that a cause of action lies under §1983 to challenge regulations or policies of bodies such as the Transit Authority. See, e.g., Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970), cert. den., 400 U.S. 853 (1971) (regulations of the Housing Authority); Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. den., 393 U.S. 940 (1968)

(regulations of the Port Authority of New York and New Jersey). Indeed, we know of no authority to the contrary and defendants cite none. 1/

Defendants further assail plaintiffs' cause of action on the ground that there is no allegation that the transit police officers act "at the direction of [the defendants] or that [the defendants] have taken any action in their official capacities or otherwise, with respect to the plaintiffs." Def. Br. p. 6. See also p. 10. This argument relates not to whether defendants are persons, but to whether defendants are persons who subject plaintiffs to a deprivation of their rights or who cause such a deprivation, as proscribed in §1983. The argument is manifestly insubstantial.

It is undisputed that the defendant Board Members maintain a regulation or policy which bars plaintiffs from selling papers in person in the subway system, and that the regulation has been and will be enforced against plaintiffs

---

1/ Defendants cite two Ninth Circuit decisions which uphold a defense of official or judicial immunity in damage suits under §1983. Worley v. Calif. Dept. of Corrections, 432 F.2d 769 (9th Cir. 1970); Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), Def. Br. p. 8. These decisions are of no relevance where, as here, the issue is the sufficiency of a cause of action as to which no such defense is even arguably applicable.

by defendants' subordinates, the Transit Police including the defendant Chief. Further, before initiating this litigation, plaintiffs addressed a written request to defendants in which plaintiffs specifically sought permission for the activities in question and asked defendants to "instruct the Transit Police not to interfere." (App., p. 19a). Defendants denied the request. (App., p. 20a). Hence, there is no doubt that defendants are the cause and enforcers of the ban upon literature sales by plaintiffs which is the subject of their complaint. 2/

2/ Defendants suggest that personal jurisdiction is lacking in that "no service has been made or even attempted upon them individually." Def. Br., p. 10. This contention - never raised below - has no factual support in the record. On the contrary, the Marshal's Return on the Summons indicates that plaintiffs specifically requested the Marshal to make service "by personal delivery," and that the Marshal made personal service upon Mrs. Ruth Kinard, a "senior clerk authorized to accept service." See document No. 4 in the Record. In any event, defendants waived any such defense when they failed to raise it in their Answer (App., p. 21a). Rule 12(h)(1) of the Federal Rules of Civil Procedure provides:

> "(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived . . . (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

II

We turn now to defendants' arguments concerning the district court's denial of preliminary injunction.[3/]

Far from providing support for the district court's action, defendants' brief points up the fatal weaknesses in the decision below. In this reply we emphasize the limited scope of the interlocutory relief sought by plaintiffs and the absence of any factual disputes relevant to that relief.

Defendants refer to the existence of supposed factual disputes as to which further evidence is needed. Def. Br. p. 27. These disputes, if they exist, are material only to the ultimate judgment sought by plaintiffs, not to the interlocutory relief sought below.

Ultimately, plaintiffs look toward an order like that mandated in Wolin v. Port Authority, supra, namely an order that defendants formulate comprehensive regulations,

---

3/ The Supreme Court recently ruled on two decisions cited in our main brief. In Chicago Area Military Project v. Camp, 508 F.2d 921 (7th Cir. 1975), the Court denied certiorari, 43 U.S.L.W. 3625 (May 27, 1975). Salem Inn v. Frank, 501 F.2d 18 (2d Cir. 1974), was affirmed in part and reversed in part, sub nom. Doran v. Salem Inn, Inc., 43 U.S.L.W. 5039 (June 30, 1975), without discussion of this court's view as quoted at page 33 of our brief.

subject to district court scrutiny of their reasonableness. See 392 F.2d at 93-4. At present, however, plaintiffs seek only a minimal interlocutory order to lift the total ban covering all times and places. See the proposed order reproduced in Plaintiffs-Appellants' Brief, p. 36 n. 18. The interlocutory injunction sought by plaintiffs would leave defendants free to issue interim rules which could regulate personal selling by means short of the total ban now in effect. Id.

Eventually, in order to measure the reasonableness of proposed, comprehensive regulations, it may well be necessary to develop extensive evidence concerning the characteristics and safety conditions at various times and places within the system.[4/] However, no such evidentiary development is needed to establish that the present total ban is patently unconstitutional.

4/ Cf. Rhoads v. McFerran, ___ F.2d ___, Slip Op. p. 3849 (Docket No. 74-2605, 2d Cir. May 30, 1975) (per curiam), where this court reversed a summary judgment and permanent injunction, on the ground that factual issues similar to those referred to in the text were disputed and required trial before final judgment. The case involved leafletting within a state office in the World Trade Center.

Defedants acknowledge that the subway system is an appropriate place for expression within the meaning of Wolin v. Port of New York Authority, supra, and similar cases. Indeed, defendants emphasize that plaintiffs are permitted to "speak to people and proselytize" through "verbal interchanges" within the system. Def. Br. p. 14. Defendants further emphasize that the system is an appropriate place for the sale of newspapers and periodicals (although defendants prefer for all sales to go through the official newsstands). Defendants also refer to the display posters which adorn much of the subway system. Def. Br. p. 27. Hence, it is undisputed that the system is open to and appropriate for expression of various forms.

Defendants argue that the subway system is an inappropriate place for "plaintiffs' proposed method of sale and distribution" of newspapers. Def. Br. pp. 16ff. Thus, defendants attempt to establish a basis for banning plaintiffs' particular method of expression while permitting other methods such as the sale of literature by newsstands, verbal speech and proselytizing, display posters in cars and stations, and perhaps even the gratis distribution of literature.

No further discussion is needed to establish that the form of expression used by plaintiffs - namely the sale of a few political journals by hand in conjunction with peaceful discussions - is "classic in simplicity and worthy of emulation." Wolin v. Port Authority, 392 F.2d at 93. We know of no case upholding a "blanket and wholesale ban" upon the orderly exercise of these classic rights by citizens in a place which is concededly appropriate for various forms of expression. Id. 392 F.2d at 92.

It remains undisputed that there are times and places in the subway system at which plaintiffs' activities would create no danger or other harmful conditions. Defendants' brief is conspicuously devoid of any serious contention that a total ban is really needed. Indeed, defendants' arguments underscore the manifest overbreadth of their ban.

Thus, defendants argue that the subway stations are "often" narrow and "usually" crowded, and that crowds are sometimes unpredictable in certain stations near "the railroads or Madison Square Garden and the theaters." Def. Br. p. 13. These factual allegations are unavailing to justify a ban which also sweeps in the places which are not narrow, the times which are not crowded, and the stations which are not subject to massive influxes from trains and theaters.

Similarly, in describing supposed dangers which would flow from the requested relief, defendants refer to disruption which might be caused by "unrestricted sale" in the "confined area of the subway." Def. Br. p. 28. But even if defendants' allegations are true, they would not support a ban which covers the unconfined areas of the system. Further, they would not support a denial of the requested relief, because plaintiffs do not seek authority for "unrestricted" selling, but have repeatedly stressed their willingness to observe needed restrictions.

Defendants argue that a decision in plaintiffs' favor would open the floodgates to "countless other groups," with the result that regulation of literature sales would become "virtually impossible." Def. Br. p. 13. But as this court held in Wolin, "the likelihood of a swarm of protesters each with their special cry disrupting the normal operation of the Terminal [is] not material where the issue involves a blanket and wholesale ban." 392 F.2d at 91-2. These problems can be dealt with by reasonable regulations limiting the times and places of sale by all such sellers - if in fact the hordes materialize in accordance with defendants' speculations.

Defendants argue that there are "adequate alternative means" for plaintiffs to exercise their freedom of expression, such as selling to defendants' newsstands or on "the public sidewalks near the subway stations." Def. Br. p. 20. See also pp. 12-13. But "the availability of some alternative forum . . . [is] not material where the issue involves a blanket and wholesale ban." Wolin v. Port of New York Authority, supra, 392 F.2d at 91-2. As the Supreme Court put it long ago, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). 5/

5/ Moreover, the alternatives suggested by defendants are gravely inadequate. We have already considered the inadequacy of the newsstands as a substitute for the personal contact and discussions which plaintiffs utilize in conjunction with the distribution of their papers. Pl. Br., pp. 23-6. The sidewalk alternative is equally inadequate. First, people on the sidewalks are generally on the move and less interested in discussion and purchases than subway users who are often idly waiting about for trains. Second, weather conditions on the sidewalks are often extremely unfavorable for plaintiffs' activities. Third, large numbers of subway riders do not emerge onto the sidewalks, but travel directly from railroad stations to office buildings with direct entry to the subway system. Fourth, plaintiffs could not encounter nearly as many subway users by standing near an entrance as by standing inside the stations, because there is a much higher concentration of riders in the stations than near any given entrance. It is common knowledge that

(fn. cont'd)

Defendants apparently contend that as a matter of law their wholesale ban is made reasonable by the fact that plaintiffs sell their papers "for a profit," citing Breard v. Alexandria, 341 U.S. 622 (1951) and Valentine v. Chrestenson, 316 U.S. 52 (1942). Def. Br. p. 15. This argument fails for several reasons.

First, the record is clear that plaintiffs do not profit from the sales. They return all sale proceeds to their local party headquarters. (App. p. 12a). They get nothing for their labors, except (they hope) increased support for their political ideas.

Second, the cases cited by defendants provide no support for their position. In Breard v. Alexandria, supra, the Court upheld an ordinance which barred travelling salesmen of magazine subscriptions from entering upon private residence property without invitation. The Court held that any First Amendment rights were outweighed by the powerful interest of the residents in maintaining the privacy

---

(fn. cont'd from preceding page)

many stations have two or more entrances, and some have ten or more. While plaintiffs could cover the interior of such a station, they could not cover all its entrances.

of their homes as against unwanted intruders. We agree with defendants that the decision retains vitality, but only in cases where the exercise of freedoms of expression threatens to invade "the privacy rights of those who may be unwilling viewers or auditors." Erznoznik v. City of Jacksonville, ___ U.S. ___, 43 U.S.L.W. 4809, 4810 (June 23, 1975) (citing Breard). See also Bigelow v. Virginia, ___ U.S. ___, 43 U.S.L.W. 4735, 4740 (June 16, 1975) (citing Breard); and Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (plurality opinion), cited by defendants at Br., p. 16. See discussion in plaintiffs' main brief, pp. 30-31. 6/

Valentine v. Chrestenson, supra, is equally unavailing to defendants. That decision upheld a ban on the distribution of advertising, apparently on the ground that such advertising is not protected by the First Amendment. There is serious doubt whether the decision retains

---

6/ The Bigelow and Erznoznik decisions remove any doubt that Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), relied on by defendants at p. 19 and elsewhere, is limited to situations where citizens would "have the advertiser's message thrust upon them as a captive audience." 43 U.S.L.W. at 4740 (Bigelow). See also 43 U.S.L.W. at 4810 (Erznoznik).

any vitality. See the recent discussion in Bigelow v. Virginia, supra, 43 U.S.L.W. at 4737-9. In any event, the Valentine decision was "distinctly a limited one" relating to "'purely commercial advertising.'" Id. at 4737. As this case does not involve regulation of commercial advertising, Valentine has no relevance even if the decision is still valid.

Third, a total ban would be fatally overbroad as a response to any legitimate concerns raised by the fact that plaintiffs distribute their papers by way of sale. If, for example, there were any serious concern about fraudulent or deceptive practices by sellers of papers, those problems could be dealt with by regulations or prohibitions aimed at fraud and deception. But there is no basis for banning all sales in order to combat such possible evils.

Finally, defendants' argument, if accepted, would mean that they could bar plaintiffs from accepting money in exchange for their papers, but could not bar plaintiffs or others from handing out their publications free of charge. In other words, the freedom to distribute political literature by hand would be limited to people who are willing and able to bear the cost of giving away the publications.

It has been settled at least since Murdock v. Pennsylvania, 319 U.S. 105 (1943), that the constitutional freedom to propagate ideas through the personal distribution of publications may not be limited to people who are prepared to give away their publications. The Court stated that

> "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 319 U.S. at 111.

A similar view prevailed in Jones v. Opelika, 316 U.S. 584, 619 (1942) (dissenting opinion), adopted by majority after rehearing, 319 U.S. 103 (1943):

> "Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas." 316 U.S. at 619.

The foregoing principles were recently applied in Hull v. Petrillo, 439 F.2d 1184 (2d Cir. 1971). Members of the Black Panther Party sued pursuant to 42 U.S.C. §1983, complaining that the police of Mt. Vernon, New York, interfered with their street sales of the party's newspaper, The Black Panther. The plaintiffs alleged that the police relied among other things upon an ordinance which prohibited

the sale of "any goods, wares, merchandise or other property" without obtaining a $15 license from the city. The district court dismissed the complaint.

This court reversed. The court held that the ordinance could not constitutionally be applied to the plaintiffs' sale of The Black Panther, citing Murdock v. Pennsylvania, supra. 439 F.2d at 836. The court stated:

> "The ability to pay is not a legitimate criterion for the state to employ in determining who is to express his views on its streets and who is not. Therefore any fee imposed as a prerequisite to the exercise of the right to communicate ideas on the public sidewalks is an unconstitutional prior restraint upon the freedom of expression." Id.

If the validity of defendants' ban turned upon the fact that plaintiffs sell the publications, it would follow that plaintiffs could escape the ban by giving them away, provided plaintiffs were in a position to bear the cost of doing so. Such a rule, no less the license fees and taxes in Murdock and Hull would make ability to pay a criterion for determining whether plaintiffs are to distribute the publications.

Defendants argue that their ban should be upheld because their revenues from the official newsstands "can be destroyed" if personal selling is allowed within the system. Def. Br. p. 23. This speculative contention is

inherently implausible, and cannot possibly be substantiated at trial. Personal selling of publications like plaintiffs' has long been prevalent on the streets and there is no resulting shortage of commercial newsstands on our street corners. Nor, contrary to defendants' predictions for the subways, have the sidewalks been besieged by peddlers selling Time magazine and the other publications which defendants wish to retain on their newsstands. Def. Br. p. 22. There is no reason why the underground newsstands will be "destroyed" any more than the above-ground stands.

But even if defendants' contention were supportable by evidence or experience, it would be legally unavailing. Defendants' position boils down to a desire to prevent citizens from expressing themselves in their chosen manner in a proper place, on the ground that defendants wish to maintain a profitable monopoly on the channels of expression. If accepted, defendants' position would authorize the City of New York to ban all selling of publications on the street except by means of dealers holding concessions from the city. The invalidity of this scheme is too plain to warrant extended discussion. Cf. Murdock v. Pennsylvania and Hull v. Petrillo, supra.

In sum, defendants have suggested nothing which they might even attempt to prove at trial which would justify the sweeping prohibition now in effect, although defendants' contentions may require trial in order to determine the permissible extent of regulation short of an absolute ban. Plaintiffs now request only that the absolute ban be lifted pendente lite. There is no reason why the district court should await evidentiary proceedings which can have no bearing upon plaintiffs' entitlement to the minimal relief now sought.

The equities are decisively in plaintiffs' favor. It is undisputed that the total ban injures plaintiffs by preventing them from expressing themselves decorously in a public place pending trial. It is undisputed that no danger or disruption would ensue if, as plaintiffs ask, the total ban were relaxed as to some times and places within the system. 7/ In view of the lopsided equities,

---

7/ The preliminary relief now sought would leave defendants free to enforce their ban against all persons except the two plaintiffs. See Doran v. Salem Inn, Inc., supra, where the Court affirmed a preliminary injunction against enforcement of a local ordinance, stating that such "relief can [not] directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute." 43 U.S.L.W. at 5042.

coupled with the substantiality of plaintiffs' case on the merits, this is a classic case for interlocutory relief.

Respectfully submitted,

RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
Tel.: (212) OX 7-8640

Attorneys for Plaintiffs